IN THE

Supreme Court of the United States

October Term 1947.

ALVIN KRULEWITCH,

Petitioner,

AGAINST

UNITED STATES OF AMERICA,

Respondent.

Petition and Brief for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

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Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Alvin Krulewitch, respectfully prays for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit, to review a judgment of that Court entered on May 11th, 1948, affirming a judgment of the District Court of the United States for the Southern District of New York, entered in that Court on April 25th, 1947, convicting petitioner of a violation of 18 U. S. Code, Secs. 398 and 399 (transporting a woman in interstate commerce for purposes of prostitution), and Sec. 88 (conspiracy to commit the same offense), after trial before Hon. James P. Leamy, District Judge, and a jury (R. 16; numerical references in this petition and the

subjoined brief, unless otherwise indicated, relate to pages of the transcript of record). Petitioner also presents for review an order of the District Court made on December 2d, 1947, denying a request for remand of the cause so that a hearing might be held on his application to set aside the judgment on the ground of false answers given by the forelady of the jury on the voir dire in concealing her prior employment in close conjunction with the Federal Bureau of Investigation for four years, and on the further ground of misconduct of the bailiff in charge of the jury in giving the jury instructions as to and during its deliberations (11). A separate appeal was taken from the order denying the motion and was heard together with the principal appeal.

Statement of Matters Involved.

It is charged in the indictment (11-16) in three counts that petitioner (who will be referred to herein as the defendant), together with one Rose Sookerman, a codefendant (not tried herein): firstly, persuaded and induced one Elizabeth Mary Johnston to go from New York City to Miami, Florida, on October 20th, 1941, for the purpose of prostitution; secondly, transported or caused her to be transported from New York City to Miami, Florida, for that purpose; and thirdly, conspired with the codefendant to commit those offenses.

Defendant was arrested on December 6, 1941, and was released in bail conditioned upon his appearance to answer the charge in Florida. Upon the adjournment of the United States Grand Jury for the Southern District of Florida in February, 1942, the United States Attorney for that district issued a certificate that there would be no prosecution against defendant, his appearance bond was released and cancelled and the matter was terminated so far as any prosecution in Florida was concerned (80-86).

The case was tried four times. The first trial was had before Clancy, *D. J.*, and a jury from July 7th, 1943, to July 13th, 1943, and resulted in a disagreement (2). The second trial was had before Porzelle, *D. J.*, and a jury from August 25th, 1943 to September 1st, 1943, and resulted in a conviction (2), which, however, was reversed by the Circuit Court of Appeals on August 1st, 1944, with an opinion by Learned Hand, *Circ. J.* (2), reported in 145 F. 2d 76. The third trial was had before Moskowitz, *D. J.*, and a jury on February 18th and 19th, 1946, and resulted in a mistrial (2). The fourth trial, occurring from April 9th to 25th, 1947, resulted in the conviction now being presented for review (3).

During the last trial the District Court conducted an inquiry on defendant's application to suppress evidence illegally seized. This hearing was held in the absence of the jury and resulted in the granting of defendant's motion (9, 105-106, 225-227).

The jury made a recommendation of lenieney (762) after specific instructions by the Court on that subject (761-762).

Defendant was sentenced to two years' imprisonment, to be followed by two years' probation (767).

Upon the imposition of sentence the District Judge stated that "there are some questions," and forthwith admitted defendant to bail pending appeal (767).

The notice of appeal was duly filed on April 30th, 1947 (10); and supplemental notice of appeal from the order was filed on December 6th, 1947 (11). Judgment of affirmance was rendered on May 14th, 1948, in an opinion by Chase, *Circ. J.* On or about June 9th, 1948, the Circuit Court of Appeals granted a stay pending the filing of the present petition, and on the same day Mr. Justice Jackson signed an order extending the time of petitioner to file his petition for certiorari to and including July 10th, 1948 (869).

Questions Presented.

The questions involved and the grounds of appeal are briefly as follows:

1.

Since the trial Court granted defendant's motion to suppress evidence obtained by an illegal search and seizure, the Government's use of evidence derived therefrom without proof of an independent source was improper, and it was reversible error to accept the prosecutor's naked assurance in lieu of such proof.

2.

The trial Court's refusal to require the Government's chief witness to disclose where she resided at the time of the trial was prejudicial and reversible error, in plain contravention of this Court's holding in Alford v. U. S., 282 U. S. 687.

3.

It was prejudicial and reversible error for the trial Court to receive in evidence, over objection, important alleged declarations of a coconspirator after the termination of the alleged conspiracy and not in furtherance thereof.

4.

The reception, over objection, of the testimony of the witness Peacock as to his understanding that the premises were to be used for purposes of prostitution was prejudicial and reversible error.

5.

The trial Court erroneously excluded the testimony of a police detective offered to show bias and prejudice of the complaining witness arising out of defendant having lodged a complaint against her of attempted extortion.

6.

Although the essence of the offense charged against defendant was transportation for prostitution, the trial Court erroneously charged the jury that transportation for a mere immoral purpose sufficed to warrant a conviction, and in this connection erroneously defined prostitution in a confusing, misleading charge.

7.

The trial Court's refusal to charge as requested that the testimony of the complaining witness should be considered by the jury with great caution and subjected to the closest scrutiny was under the circumstances reversible error.

8.

The Court's bare affirmative answer to the jury's written question, transmitted during their deliberations, as to whether they could recommend leniency, was erroneous as tending to induce a verdict of conviction which might not otherwise have been reached.

9.

It was error to deny defendant a hearing on controverted issues of fact raised by his motion for a new trial based upon the grounds that the forelady of the jury had fraudulently concealed her prior employment by the Government and that a bailiff in charge of the jury presumed to give the jury instructions during the course of their deliberations.

Reasons for Allowance of Writ.

The basic reasons petitioner urges for the allowance of certiorari herein are substantially the same as the propositions outlined as constituting the questions presented above.

That the proposed appeal is a meritorious one appears from the 13-page opinion of the Circuit Court of Appeals. Petitioner urged some ten major points of law, all of them substantial and arguable. The opinion discussed most of the points and clearly recognized that the questions presented were not free from difficulty. *Inter alia*, the Court referred to the holding in *Alford* v. *U. S.*, 282 U. S. 687; and, it is submitted, failed to distinguish it. Secondly, the Court approved the procedure of the District Judge in accepting the assurance of the prosecutor as to the source of evidence (in lieu of proof) when the evidence was challenged—despite the prior adjudication that there had been an unlawful search and seizure. Thirdly, the Court cited the Third Circuit's holding in *Speiller* v. *U. S.*, 31 F. 2d 682, but chose to declare a contrary rule. Fourthly, on an important question relating to the admissibility of evidence, the Circuit Court of Appeals stated its holding to be different from that in another circuit, saying:

> "While *Brain* v. *U. S.*, 5th Cir., 17 F. 2d 741, is by implication directly to the contrary, we decline to follow it."

Fifthly, the Circuit Court of Appeals admitted (864) that the trial Judge did not in his instructions clearly distinguish the two types of prosecution under the statute involved. Sixthly (866), the same Court admitted that on a point relating to the jury's recommendation, "the state court cases seem to be in conflict". The above-mentioned considerations are only a few of the matters that are indicative that the case presents numerous difficult questions of law, all of them appropriate for further review.

In conjunction with all of the points of law, petitioner insists, as he has consistently declared and reiterated throughout this long and debilitating prosecution, that he is altogether innocent of the offenses with which he is charged. The dismissal of the Florida proceedings at the very outset, the four trials, the disagreement, the reversal of one conviction, the difficulty confronting each jury, the recommendation of leniency, the Government's oppressive methods, the tainted and unreliable character of the evidence employed against him—these and a myriad other circumstances suggest that this is no mere routine case wherein an offender seeks some device to evade punishment. This background gives added weight and cogency to each argument herein advanced. While the points made are doubtless available to every aggrieved litigant, they are most certainly tenable in the case of an individual who, though innocent, has been adjudged otherwise through the tenacious hatred and jealousy of an unscrupulous woman. The most charitable view to be taken of the Government's case is that the case is a close one, wherein especially sedulous care must be exercised to discover whether any important right of petitioner's has been denied or prejudiced, for in such circumstances an error that

might elsewhere be condoned or disregarded could easily have sufficed to turn the scales of the verdict against him. "Finally, if the record shows error, but does not disclose whether the error is prejudicial or whether it is not prejudicial, it is presumed to be prejudicial and to require reversal." (*Ah Fook Chang* v. *U. S.*, 91 F. 2d 805.

WHEREFORE, your petitioner prays that a writ of certiorari issue to the United States Circuit Court of Appeals for the Second Circuit commanding said Court to certify and send to this Court, on a day to be designated, a full and complete transcript of the record and all proceedings of said Circuit Court of Appeals had in this cause, to the end that this cause may be reviewed and determined by this Court; that the judgment of the Circuit Court of Appeals be reversed; and that the petitioner may be granted such other and further relief as may seem proper.

Dated: New York, N. Y., July ...8..., 1948.

ALVIN KRULEWITCH,
Petitioner.

By JACOB W. FRIEDMAN,
Counsel for Petitioner.

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BRIEF IN SUPPORT OF PETITION.

Opinions Below.

The opinion of the Circuit Court of Appeals for the Second Circuit is reported in 167 F. 2d 943. It is annexed to the certified transcript of the record heretofore filed herein.

No opinion was rendered by the United States District Court for the Southern District of New York, except the opinion condemning the unlawful search and seizure and granting defendant's motion to suppress (105-106).

Jurisdiction.

The judgment of the Circuit Court of Appeals now sought to be reviewed was entered on May 11th, 1948, and

petitioner's time to file for certiorari was extended by Mr. Justice Jackson to and including July 10th, 1948. The jurisdiction of the Supreme Court of the United States is invoked under Section 240(a) of the Judicial Code, as amended, also known as 28 U. S. Code, Sec. 347.

Statutes Involved.

The statutes involved are Title 18, Sections 398 and 399, United States Code, and Title 18, Section 88, United States Code. They read as follows:

"TITLE 18, SECTION 398, U. S. CODE

Section 398. WHITE-SLAVE TRAFFIC; TRANSPORTATION OF WOMAN OR GIRL FOR IMMORAL PURPOSES, OR PROCURING TICKET. Any person who shall knowingly transport or cause to be transported, or aid or assist in obtaining transportation for, or in transporting, in interstate or foreign commerce, or in any Territory or in the District of Columbia, any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice; or who shall knowingly procure or obtain, or cause to be procured or obtained, or aid or assist in procuring or obtaining, any ticket or tickets, or any form of transportation or evidence of the right thereto, to be used by any woman or girl in interstate or foreign commerce, or in any Territory or the District of Columbia, in going to any place for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent or purpose on the part of such person to induce, entice, or compel her to give her-

self up to the practice of prostitution, or to give herself up to debauchery, or any other immoral practice, whereby any such woman or girl shall be transported in interstate or foreign commerce, or in any Territory or the District of Columbia, shall be deemed guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding $5,000, or by imprisonment of not more than five years, or by both such fine and imprisonment, in the discretion of the court. (June 25, 1910, c. 395, Section 2, 36 Stat. 825.)

TITLE 18, SECTION 399—U. S. CODE

(Re: White Slave Traffic)

399. Same; inducing transportation for immoral purposes.—Any person who shall knowingly persuade, induce, entice, or coerce, or cause to be persuaded, induced, enticed, or coerced, or aid or assist in persuading, inducing, enticing, or coercing any woman or girl to go from one place to another in interstate or foreign commerce, or in any Territory or the District of Columbia, for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose on the part of such person that such woman or girl shall engage in the practice of prostitution or debauchery, or any other immoral practice, whether with or without her consent, and who shall thereby knowingly cause or aid or assist in causing such woman or girl to go and to be carried or transported as a passenger upon the line or route of any common carrier or carriers in interstate or foreign commerce, or any Territory or the District of Columbia, shall be deemed guilty of a felony and on conviction thereof shall be punished by a fine of not more than $5,000,

or by imprisonment for a term not exceeding five years or by both such fine and imprisonment, in the discretion of the court. (June 25, 1910, c. 395, §3, 36 Stat. 825.)

TITLE 18, SECTION 88—U. S. CODE

88. (CRIMINAL CODE, SECTION 37.) CONSPIRING TO COMMIT OFFENSE AGAINST UNITED STATES.—If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both. (R. S. Section 5440; May 17, 1879, c. 8, 21 Stat. 4; Mar. 4, 1909, c. 321, Section 37, 35 Stat. 1096.)"

Statement of the Case.

We do not desire to extend this brief unduly by a protracted review of the facts. The case against defendant rests almost in its entirety on the testimony of Elizabeth Johnston, also variously known as Elizabeth Mary Sorrentino, Joyce Winters, Joyce Winston, Mrs. Curtis and otherwise (47). The substance of her testimony, viewed in the light most favorable to the Government, was tersely outlined in the opinion of the Circuit Court of Appeals on the first appeal (145 F. 2d 76), Learned Hand, *Circ. J.*, writing:

> "The substance of the testimony, most of which was that of a professional prostitute, Joyce, was as follows. Shortly after Joyce had made the acquaintance of the accused, he took her to Chicago where he tried to get her to live in a brothel. She

> refused and came back to New York, where later she and the co-defendant, Sookerman, lived in various apartments where they practiced prostitution; and this was known to defendant. In October, 1941, the accused suggested to her and Sookerman that they should go to Miami and should there ply their calling. They agreed and the accused took them to Miami with him and installed them in a hotel which he had leased and where they 'worked', paying over their earnings to him. Later Joyce became ill and again returned to New York."

All of the foregoing, to the extent that it incriminated defendant, was flatly denied by him (585), an individual who has been in a reputable and substantial advertising business for many years (512-518). The Circuit Court of Appeals in the same opinion made the following comment upon her testimony and credibility:

> "She was undoubtedly an unruly and extremely unstable person, she had been wayward from the outset of her career, and had early served a term in a reformatory * * * a hysterical woman, probably never well balanced emotionally, and in any event enervated by a life from girlhood of carousing and debauch * * * her ungoverned moods and caprices * * * Joyce herself was shown to be to the last degree untrustworthy."

The purpose of these comments by Learned Hand, *Circ. J.*, was to show that it was error on the trial then being reviewed to withhold from defendant for use on cross-examination a certain signed statement of the witness squarely at variance with her testimony. The Court thus described it:

> "Joyce had been questioned at her home by an agent of the Federal Bureau of Investigation on December 8, 1941, thirteen months before the indictment was filed; she signed a written statement of five pages which the agent took away with him, and which completely exculpated the accused, saying that she and Sookerman had gone to Miami of their own choice, to 'work' there on their own account; that the accused had nothing whatever to do with their going, although he had gone down later and had seen them; and that the witness had never had any illicit relations with him."

As to this contradictory statement alone the Court observed:

> "* * * We surely cannot say that this circumstantial story so totally at variance with her testimony, might not have created enough doubt to turn the scales in favor of the accused."

If she had already been "shown to be to the last degree untrustworthy", we can fairly urge that this formal declaration, actually used on the last trial, operated well-nigh conclusively to deprive her testimony of any trace of credibility, and that the conviction was necessarily chargeable to the many other serious errors that were committed.

That the same witness did not make a better showing on the last trial appears from the following observations in the opinion of Chase, *Circ. J.* (861):

> "It had already been shown that she had been a prostitute since her teens. She had admitted on cross-examination that she was living at the time of the trial in an illicit relationship and had been doing so for about eleven months. She had readily stated

that she had previously lied about this very case in a sworn statement to an F. B. I. agent. She had conceded that she had attempted to blackmail the appellant and that she had been arrested upon several occasions and spent time in at least three reformatories."

We reiterate that the conviction sought to be reviewed rests almost exclusively upon the testimony of this unsavory witness.

Specification of Errors to Be Urged.

It is intended to urge the following errors:

1.

Since the trial Court granted defendant's motion to suppress evidence obtained by an illegal search and seizure, the Government's use of evidence derived therefrom without proof of an independent source was improper, and it was reversible error to accept the prosecutor's naked assurance in lieu of such proof.

2.

The trial Court's refusal to require the Government's chief witness to disclose where she resided at the time of the trial was prejudicial and reversible error, in plain contravention of this Court's holding in Alford v. U. S., 282 U. S. 687.

3

It was prejudicial and reversible error for the trial Court to receive in evidence, over objection, important alleged declarations of a coconspirator after the termination of the alleged conspiracy and not in furtherance thereof.

4.

The reception, over objection, of the testimony of the witness Peacock as to his understanding that the premises were to be used for purposes of prostitution was prejudicial and reversible error.

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The trial Court erroneously excluded the testimony of a police detective offered to show bias and prejudice of the complaining witness arising out of defendant having lodged a complaint against her of attempted extortion.

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Although the essence of the offense charged against defendant was transportation for prostitution, the trial Court erroneously charged the jury that transportation for a mere immoral purpose sufficed to warrant a conviction, and in this connection erroneously defined prostitution in a confusing, misleading charge.

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The trial Court's refusal to charge as requested that the testimony of the complaining witness should be considered by the jury with great caution and subjected to the closest scrutiny was under the circumstances reversible error.

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The Court's bare affirmative answer to the jury's written question, transmitted during their deliberations, as to whether they could recommend leniency, was erroneous as tending to induce a verdict of conviction which might not otherwise have been reached.

9.

It was error to deny defendant a hearing on controverted issues of fact raised by his motion for a new trial based upon the grounds that the forelady of the jury had fraudulently concealed her prior employment by the Government and that a bailiff in charge of the jury presumed to give the jury instructions during the course of their deliberations.

ARGUMENT.

1.

Since the trial Court granted defendant's motion to suppress evidence obtained by an illegal search and seizure, the Government's use of evidence derived therefrom without proof of an independent source was improper, and it was reversible error to accept the prosecutor's naked assurance in lieu of such proof.

Defendant's premises had been searched and his papers and property seized in violation of the prohibition of the Fourth Amendment. He duly applied to the trial Court to have that evidence suppressed. In this motion he was successful, the Court concluding that the search and seizure did not constitute a lawful incident of the arrest, but were wholly exploratory and general and made solely to find evidence of defendant's guilt (79, 87-102, 103-106); that defendant had not consented to the search or done anything else to legalize it. A formal ruling was made that all the evidence so illegally obtained should be suppressed, and the Government was ordered to return to defendant his conceded belongings (225-227).

Nevertheless, the Government throughout the trial continued to introduce evidence which was quite clearly the

fruit and outgrowth of the outlawed search (*e. g.*, 56-58, 410, 418-419, 391-401, 221-224, 340-342, 382-390, 362-365, 611). Much of this evidence was resisted by defendant, viz objection and motion to strike (56-58, 418-419, 421, 391-393). Thus, when defendant objected to important testimony of the witness Levenson and the prosecutor maintained that he had obtained Levenson's name and address from the codefendant, defendant demanded that the statement of the codefendant be produced for the purpose of verifying the prosecutor's assertion. Instead of requiring its production as sought by defendant, the Court declined to direct that it be produced and stated that on the assurance of the United States Attorney the Court would admit the tesimony (393, 418, 409-412). The sequence of proof in his connection is most illuminating. The witness Levenson was called by the Government. He was a Baltimore furniture manufacturer and the uncle of defendant by marriage (391). The substance of his testimony was that on October 21st, 1941, defendant called on him in Baltimore and "said that he wanted to buy some furniture for some hotel in Florida," which furniture he proceeded to buy (394). The damaging implications of this testimony are obvious. As soon as this witness was called, defendant interposed this objection (391):

> "An objection is made to the testimony of this witness on the ground that the evidence which he will give is based upon information received from papers found in the search of December 6, 1941."

To this the United States Attorney answered (391):

> "The Government's position is that this witness was not located from the information given or obtained on December 6, 1941, but was obtained as a result of conversations had with the defendant Rose Sookerman, and with the witness Mrs. Sorrentino."

The Court ruled (391):

> "With that assurance I will permit the testimony."

Defendant's counsel thereupon pointed out that among the papers seized were the bills of furniture from the witness; the prosecutor did not dispute this but insisted (392):

> "We maintain, as I have previously stated, that this lead on this witness was obtained through Betty Sookerman or Rose Sookerman, when a statement was obtained from her. * * * The defendant Sookerman gave his name and address."

Defendant's counsel then stated, with the result indicated, (393):

> "I think you ought to produce that statement, if the Court please. I do not think we have a right, representing this defendant, to rely on that statement of the District Attorney. If he has a statement of Sookerman I feel that he ought to produce it.
>
> The Court: Can you?
>
> Mr. Hilly: Your Honor, I haven't got the original statement—wait a minute. I can get the original statement from the FBI.
>
> Mr. Pinto: Your Honor——
>
> The Court: Wait a minute, please, not two at a time.
>
> Mr. Hilly: I have not got the original statement, but I have the statement as set forth in an FBI arrest report which came from Miami, Florida. If your Honor wants that and if you will grant me a two-minute recess I will go down to the office and find it.

"The Court: No, on your assurance I will permit the testimony.

Mr. Pinto: Exception."

It later developed (412) that, while the prosecutor originally contended (391) that the information as to Levenson was obtained from both Rose Sookerman and Mrs. Sorrentino, he was unable to produce a statement from either. Yet the Court reiterated its ruling with respect to the desired production of any statement, saying to defense counsel, "You asked me to compel him to do it and I declined to do so. I said I would take his word for it."

Equally striking was the trial Court's attitude in connection with the testimony of the witness Hames concerning a baggage receipt taken from defendant's apartment. The Court said to the District Attorney (224-227):

> "On your assurance that the testimony which you are about to introduce is not the fruit of the illegal search, I will receive the evidence."

No fair reading of the record can suggest that the procedure followed was approved by defendant, who was repeatedly voicing objections and taking exceptions, as appears above.

The Circuit Court of Appeals dealt with this point by recognizing the "settled law in federal courts that evidence is inadmissible not only when obtained during an illegal search but if derived from information gained in an illegal search," citing *Weeks* v. *U. S.*, 232 U. S. 383; *Silverthorne Lumber Co.* v. *U. S.*, 251 U. S. 385; *Weiss* v. *U. S.*, 308 U. S. 321; *Nardone* v. *U. S.*, 308 U. S. 338, and *Goldstein* v. *U. S.*, 316 U. S. 114. Nevertheless, the Court declared herein: "The trial Court's acceptance of the assurance of the prosecuting attorney, who presumably was in possession of actual knowledge as to the origin of the evidence, was not an abuse of discretion."

To summarize the situation with respect to the results of the illegal search and seizure, several occasions arose during the trial when defendant sought to exclude evidence improperly seized and its *sequelae*. Although the Court on the primary hearing had adjudicated the illegality of the search and ruled correctly as to the test document then immediately under consideration, we submit that the subsequent rulings were not well founded. It became and was the duty of the Court whenever a fresh piece of evidence was in good faith challenged, to take testimony as to its provenience. However cumbersome this procedure may appear in retrospect, we know of no other fashion whereby the rights of the defendant might have been adequately safeguarded. After all, the illegal search was the misconduct of the Government's own agents, and it should not be heard to complain if an inquiry was necessitated thereby. To say that in lieu of an investigation the Court was justified in accepting the prosecutor's bland assurance that the evidence came from an independent source, would be placing the rights of an accused at the mercy of the opinion of the individual charged with the prosecution. Whatever his integrity, it is surely reasonable to suggest that upon a nice evaluation of the genesis of some particular evidence his judgment might be clouded by the understandable zeal of advocacy. We are aware of no other adjudicated case in which the Court confronted with a problem arising upon the admissibility of evidence allegedly obtained by illegal search was held entitled to take the statement of the prosecutor as a substitute for proof. We submit, as we did below, that the rulings now presented for review were violative of the rights of the defendant under the Fourth Amendment of the Constitution of the United States.

2.

The trial Court's refusal to require the Government's chief witness to disclose where she resided at the time of the trial was prejudicial and reversible error, in plain contravention of this Court's holding in Alford v. U. S., 282 U. S. 687.

At the outset of the cross-examination of the complaining witness she stated in answer to a question that she was unwilling to say where she was then living (121-122, 124). The question was later repeated and objected to by the prosecutor (307-308), who was willing to give the address to defendant's counsel confidentially but insisted that it be not placed on the record, whereupon the trial Court excluded the question. In other words, the personal preference of the witness and the objection of the United States Attorney were deemed adequate basis for withholding from the jury the residence address of the chief witness and for foreclosing all further inquiry along those lines and the avenues to which it might lead. It should also be noted that the witness hinted that if defendant knew her address, he would molest her. Cf. *People* v. *Shapiro*, 255 App. Div. 380, 7 N. Y. S. 2d 607.

That this was undoubtedly erroneous appears from the decision of this Court in *Alford* v. *U. S.*, 282 U. S. 687. There a conviction of mail fraud was unanimously reversed solely on the ground that the trial Court erred in sustaining an objection to this single question propounded on cross-examination of one of the Government's witnesses: "Where do you live, Mr. Bradley?" In a well-reasoned opinion, citing numerous authorities, Mr. Justice Stone pointed out that the residence of a witness is a basic and fundamental subject of inquiry so "that the jury may interpret his testimony in the light reflected upon it by knowledge of his environment." In the absence of that

"proper setting," "the jury cannot fairly appraise" or "put the weight of his testimony and his credibility to a test." Since "the trial Court cut off *in limine* all inquiry on a subject with respect to which the defense was entitled to a reasonable cross-examination," "this was an abuse of discretion and prejudicial error."

Our argument on this point was considered at some length by the Circuit Court of Appeals, and we submit that the attempted differentiation of the *Alford* case was not a sound one. The first distinction suggested is that the environment of the witness had already been brought out on direct and cross-examination and it had been established that she was a harlot, a prevaricator, a blackmailer and an ex-convict (1384-1385). To this our reply is threefold: The witness in the *Alford* case was also examined at great length and the fullest latitude had been permitted in other aspects of his examination (see p. 691 of that opinion); secondly, the more disreputable the witness, the more imperative it becomes that defendant should not be precluded from proving additional obloquy, for this one added opprobrious consideration may suffice to deprive the witness of the last shred of credibility; thirdly, to establish a precedent of withholding the address of a witness who has or may be otherwise discredited is dangerous, impracticable and uncertain in its application and grossly unfair to the accused.

The second purported distinction by the Circuit Court of Appeals was that in the light of the hysterical character of the witness and her emotional imbalance, to permit questioning as to her address would have annoyed or humiliated her to the point where she might have "become even less controllable," so that a wise discretion dictated that she be excused from furnishing this information. We are unable to perceive how a meticulous judicial solicitude for the feelings of a woman of this stamp should be permitted to outweigh the rights of a defendant whose liberty is at stake.

In any case this Court has announced in unequivocal language that the exclusion of such a question is an abuse of discretion and reversible error, and that should be the end of it.

3.

It was prejudicial and reversible error for the trial Court to receive in evidence, over objection, important alleged declarations of a coconspirator after the termination of the alleged conspiracy and not in furtherance thereof.

The alleged conspiracy is supposed to have taken place in September and October, 1941 (13-14). The complaining witness was arrested in or about December, 1941 (109), by an agent of the Federal Bureau of Investigation and taken to Rochester, N. Y., from Canandaigua, N. Y. for a week (110), where she was visited by the codefendant. It is absolutely evident that the conspiracy, if any, was now at an end, for certainly defendant and the codefendant were not conspiring to entice or transport the complaining witness after the latter had been arrested, and statements of the codefendant at this time could in no sense be regarded as in furtherance of the conspiracy. Nevertheless, when the complaining witness was asked to state the conversation with the codefendant on this occasion, and defendant objected on the ground that the conspiracy had terminated with the completion of the alleged transportation and this was no act in furtherance of the conspiracy, the trial Court overruled the objection (110-111). The witness was then permitted to testify as to a statement by the codefendant which, if true, fastened upon defendant a plain imputation of guilt (111-112). In a close case such evidence could easily have sufficed to turn the tide towards effecting a conviction. Nor can the prosecution consistently minimize the effect of the proof, for the great weight attached to it appears from the circumstance

that in the United States Attorney's opening statement to the jury, brief as it was (fol. 29), very conversation was detailed at length (fol. 30-31), although even at that stage of the proceedings defendant objected unsuccessfully to all references thereto, duly noting an exception.

It is established by a long line of authorities, of which we need cite but a few, that an alleged statement made by a coconspirator after the termination of the conspiracy and not in furtherance of the common design, is admissible only against himself and not against another conspirator, and where the other alone is on trial the statement is not admissible at all. *U. S. v. Alfano*, 152 F. 397; *Galatas v. U. S.*, 80 F. 2d 15; *Fiswick v. U. S.*, 329 U. S. 217, 91 L. Ed. 196.

While the Circuit Court of Appeals cited several of these cases, including the *Fiswick* decision, it declared them inapplicable—notwithstanding the plain declaration in the *Fiswick* case that although the result of a conspiracy continue, it does not thereby become a continuing one; that confession after apprehension is not in furtherance of the enterprise but rather a frustration of it; and that even though it be part of the conspiracy to deceive the Government, admissions made to officers end it and are not admissible against erstwhile fellow conspirators.

The Circuit Court of Appeals justified the reception of the proof on the ground that implicit in a conspiracy there was an agreement among the conspirators to conceal the violation and that the conspiracy continued for purposes of concealment even after its primary aims had been accomplished (362, 363). The difficulty with this proposition is that the declarations in question were made in December, 1941 (fol. 112), after the arrest of the complaining witness (fol. 99) and after defendant himself and the codefendant had been arrested (fol. 575). Therefore, any supposed authorities rendering such statements admissible where their actual purpose is to avoid detection and arrest are plainly inapplicable.

In any case the Circuit Court of Appeals said on this score (863):

> "While *Braun* v. *U. S.*, 5 Cir., 47 F. 2d 741, is by implication directly to the contrary, we decline to follow it."

We are thus faced with a situation wherein the Second Circuit Court of Appeals expressly announces its disagreement with the Fifth Circuit Court of Appeals on an important and vexatious point of criminal procedure, and one which arises with great frequency in prosecutions for conspiracy. To the end that the difference of opinion in the several circuits be ended and the law authoritatively clarified, we submit that this element of the case alone, apart from the other weighty considerations, eminently calls for the granting of certiorari.

4.

The reception, over objection, of the testimony of the witness Peacock as to his understanding that the premises were to be used for purposes of prostitution was prejudicial and reversible error.

Arthur S. Peacock was a Government witness, second in importance only to the complaining witness. He owned a bicycle shop in the premises defendant was charged with having rented for purposes of prostitution. His testimony was to the effect that October 1st, 1941, defendant came into his store and inquired about leasing the quarters upstairs (235-236). Peacock told him that the building had recently been sold and informed him where he might find the new owner (236). The witness seeming to have some difficulty in recalling, the prosecutor asked him the following question (237):

> "And after your conversation with this man did you have any understanding as to what, from your conversations with him did you have any understanding as to what the place was going to be used as?"

An unsuccessful objection was interposed to this question as calling for a conclusion, and the witness answered (237):

> "In accordance to my belief at that time the gentleman led me to believe that there was going to be the same as had been operated there sometime before a house of prostitution."

A motion for a mistrial in consequence of this answer was denied (237-239). It further appeared that the same witness had testified on the first and second trials, both of which had taken place almost four years prior to the trial now under review; that on each of these occasions he had been asked to give his conversation with defendant, and in neither instance had he mentioned a word about prostitution (240, 244, 249, 253-256); that before he took the stand on the present trial the Assistant United States Attorney in charge of the prosecution had had a conversation with him and had directed his attention to the fact that he had previously omitted to mention the house of prostitution (242). While we dislike to dwell on this phase of the Government's preparation, it is enough to say that even if the testimony were competent, it can hardly be viewed as of a character entitling it to favorable consideration.

The law of evidence does not countenance proof of this kind. A witness is not permitted to state the impression made upon him by oral statements, or to testify as to the meaning or his understanding of a conversation. *Fish v. Wise*, 52 F. 2d 544, cert. den. 284 U. S. 688; *Fields*

v. *Copeland*, 121 Ala. 644, 26 So. 491; *Whitmore* v. *Ainsworth*, 4 Cal. Unrep. 872, 38 P. 196; *Dicht* v. *State*, 157 Ind. 549, 62 N. E. 51; *State* v. *Brown*, 86 Iowa 121, 53 N. W. 93; *Peerless Mfg. Co.* v. *Gates*, 61 Minn. 124, 63 N. W. 260. The mere fact that the testimony as to understanding is a sequel to testimony concerning a conversation does not thereby render it admissible. *Higgins* v. *Dakin*, 86 Hun 461, 33 N. Y. S. 890. "The opinion, the thought, the understanding of the witness was not evidence." *People* v. *Sharp*, 107 N. Y. 427.

It is therefore clear that in both civil and criminal cases courts have uniformly declared that witnesses should not be permitted to advance their own speculations or conjectures as to what they understood from conversations with other persons. It is obvious that testimony of this type is probative of nothing and is susceptible of the greatest abuse, of which no more vivid instance could be conceived than that presented by the case at bar. The testimony of Peacock dealt with the very essence and core of the charge. His testimony as to the actual subject-matter of his conversation with defendant was quite innocuous, as it had been on two prior trials. But when the prosecution passed beyond the stage of requiring the witness to narrate his recollection of what he had seen and heard and called for his understanding, this passed beyond the limits permitted by the law of evidence and injected into the trial a conclusion without factual foundation and one that was patently damaging to defendant. This would be error in any case, and is especially so in one so closely litigated, wherein even a slight deviation from the strictest legal safeguards might have operated to induce a conviction. Conversely, had there been a sound ruling on the point, as the Circuit Court of Appeals remarked when it reversed the former conviction herein, "we surely cannot say that this * * * might not have created enough doubt to turn the scales in favor of the accused."

In attempting to justify the ruling, the Circuit Court of Appeals cited two of its own prior decisions and one text. The first case was *U. S. v. Cotter*, 60 F. 2d 689, cert. den. 287 U. S. 666, where a codefendant, himself on trial, was asked in a mail fraud case whether he did not consider the conduct of the business irregular; this was held proper as testing his own good faith, and that the most trial judge need have done—which was not requested—was to tell the jury they should not impute the guilty knowledge of the witness to the other defendants. The other case was *Central R. Co. of New Jersey* v. *Monahan*, 11 F. 2d 213, holding that "it would have been better to allow the conductor to say whether he could have felt the jerk where he was standing, and whether it was necessary for him to give a starting signal in addition to the movement of the dwarf switch"; even there the Court said with regard to rulings sustaining objections to questions calling for the opinion of the witnesses, "These were probably correct, according to the orthodox American canon."

The Circuit Court of Appeals, as we have indicated, cited one text, namely, 7 Wigmore on Evidence, Secs. 1962, 1969. But in this situation the late Professor Wigmore, as in others, advanced theoretical views which he admitted to be at variance with the great weight of authority. An inspection of his footnotes discloses that fourteen jurisdictions which have had occasion to consider the question exclude testimony as to the impression or understanding a witness has derived from a conversation (Arkansas, California, District of Columbia, Georgia, Illinois, Indiana, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New York, Ohio and Vermont). In five jurisdictions the law seems to be unsettled, cases having been reported both for the admission and exclusion of the evidence (Alabama, Iowa, Kansas, Mississippi and Nebraska). In one lone jurisdiction (Michigan) the re-

ported case is in favor of the admission. Accordingly, there can be no question that the overwhelming weight of authority condemns the use of testimony of the type we have complained of in this point.

In brief, the established law bars evidence of the understanding of a witness though derived from a conversation. A violation of this rule, where manifestly prejudicial, necessitates a reversal of a judgment of conviction. The adoption of the Circuit Court of Appeals of an important rule of evidence which contravenes principles laid down by the great weight of other judicial authority calls for correction on certiorari.

5.

The trial Court erroneously excluded the testimony of a police detective offered to show bias and prejudice of the complaining witness arising out of defendant having lodged a complaint against her of attempted extortion.

Defendant called as a witness one Slattery, a detective of the New York City Police Department (504), who testified that in 1942, shortly before this prosecution began, defendant called at the station house and had a talk with him. On the objection of the Government the conversation was excluded, and defendant excepted, after a formal tender of proof wherein it was explained that the purpose of the evidence was to show that defendant was lodging a complaint of attempted extortion against Mrs. Sorrentino, which resulted in bias and prejudice on her part and furnished a motive for testifying falsely against him (504-505).

The exclusion of this proof was contrary to established law, as set forth in *People* v. *Kadel*, 95 Misc. 514, 160 N. Y. S. 817; *People* v. *Michalow*, 229 N. Y. 325, 331; *Hale* v. *U. S.*, 25 F. 2d 430, 438; *U. S.* v. *Senft*, 274 F. 629; and Abbott's Criminal Trial Practice, 4th Ed., Sec. 327.

The Government's answer to this argument was that the proposed proof would not have established that the complaining witness herein (Mrs. Sorrentino) had heard of the charge of attempted extortion made against her by defendant. The difficulty with this contention is that the Government's objections precluded the proof's development. It is scarcely logical for the prosecution to stifle the proof and subsequently, in justification, rely upon its inadequacy or incompleteness. Nor is it significant that Mrs. Sorrentino admitted the extortion attempt, for what defendant sought to prove was the circumstances attendant upon his attempt to institute a prosecution therefor. (284-285).

6.

Although the essence of the offense charged against defendant was transportation for prostitution, the trial Court erroneously charged the jury that transportation for a mere immoral purpose sufficed to warrant a conviction, and in this connection erroneously defined prostitution in a confusing, misleading charge.

The indictment formally accuses defendant (11-16) of inducing the complaining witness to go in interstate commerce for prostitution, debauchery and other immoral purposes and with transporting her and conspiring so to do.

The nature of the prosecution is limited by the Government's opening statement declaring that defendant is charged with persuading and transporting "for the purposes of prostitution" 627).

Mrs. Sorrentino's testimony (72) is to that effect.

The opinion of the Circuit Court of Appeals on the first appeal (145 F. 2d 76), in its opening sentence, characterized the conviction as being one "for transporting a woman in interstate commerce for purposes of prostitution." Nor was this a mere inadvertence, for the Court

proceeded to distinguish the Eighth Circuit decision in *Ellis v. U. S.*, 138 F. 2d 612, wherein "the indictment was for transporting girls, not for purposes of prostitution, but for purposes of lechery."

So the case is clearly one of a charge of transporting a woman for prostitution, or commercialized vice, and not to gratify defendant's own immoral designs. Indeed, the latter putative aspect of the case was not so much as mentioned in the recital of the facts contained in the United States Attorney's last brief filed in the Circuit Court of Appeals herein (p. 3 thereof).

While the word "prostitution" is well understood to mean "the offering, by a woman, of her body, to indiscriminate intercourse with men for hire" (Funk & Wagnalls New Standard Dictionary, p. 1990), and, as used in the Mann Act, means "commercialized vice" (*Johnson v. U. S.*, 215 F. 679), the trial Court herein ignored two important matters in its charge on this point: (1) the commercial or sexual implications of the term; and (2) that the accusation against defendant was thus circumscribed. On this crucial phase of the case the entire charge is extremely confusing (746-753), of which confusion the following excerpts are illustrative (748, 749-750):

> "Prostitution is the practice of sexual intercourse between a man and woman outside of the marital relationship. * * *
>
> "Did this defendant cause this girl to travel in interstate commerce for immoral purposes? * * *
>
> "You are to deal with each of the counts of the indictment separately and you are to determine under counts 1 and 2 from the evidence here whether or not this defendant persuaded the girl Sorrentino to be transported, or even aided or assisted in obtaining transportation for her in interstate commerce for immoral purposes, debauchery, or

prostitution. If he did he is guilty under counts 1 and 2."

The following exception to the charge was noted by defendant (760-761):

> "We respectfully except to the charge of the Court that this defendant can be convicted if it is found that the girl was taken to Florida by him, or caused to be taken there for immoral purposes, on the ground that there is no evidence in the record that would indicate that the Government maintains that she was taken there for immoral purposes. The entire proof is that she was taken there for commercialized prostitution."

The distinction we urge is neither subtle nor tenuous, but runs to the very foundation of the prosecution. The record is replete with evidence, and, indeed, it is undisputed that there was an illicit relationship between defendant and the complaining witness, but this was never claimed to constitute the basis for the indictment. Nevertheless, on the foregoing instructions the Court permitted the jury to convict defendant upon a finding that he persuaded her to go to Florida for purposes of lechery. And if by any construction it may be urged that the Court sufficiently stressed prostitution as a *sine qua non* for a guilty finding—although we submit that the language employed is not susceptible of any such interpretation—then the complete effect of a proper understanding was vitiated by the erroneous definition of prostitution as consisting of "the practice of sexual intercourse between a man and woman outside of the marital relationship."

The correctness of the position taken by defendant on this point is supported by the holding of the First Circuit Court of Appeals in *Malaga* v. [illegible] S., 57 F. 2d 822,

wherein proof of one type of the offense was held not sufficient to justify a conviction where the theory of prosecution was the commission of the other type; the Court carefully differentiated between the two types of conviction permissible under 18 U. S. C. Sections 398, 399, and disapproved of instructions relating to one when the prosecution was for the other. See also the holding of the Fourth Circuit Court of Appeals in *Van Pelt* v. *U. S.*, 240 F. 346. We submit that in view of the sharp distinction between the two permissible classes of prosecution under the statute, it was clearly reversible error, this being the case of one type, to submit the issues to the jury under instructions permitting conviction upon a finding that the case fell within the second classification.

That the District Court seems to have misconceived the distinction appears further from its erroneous refusal to grant defendant's second request to charge, to which refusal exception was duly noted (761). That request was as follows (738):

> "In this prosecution, the Court is not concerned with any unconventional relationship between the defendant and the witness Sorrentino. If the jury find that they had been living together, though not married, and that the trip to Florida was planned as an incident of such relationship, and for no other purpose, the defendant must be acquitted."

The refusal to instruct in the above manner was, of course, entirely consistent with the Court's attitude in failing to establish any distinction between the two classes of purposes which might underlie the commission of the offense. We believe it needless to labor the point that defendant was necessarily prejudiced by the omission to acquaint the jury with the distinction involved.

The charge seems to call for the application of the salutary observations in *Bollenbach v. U. S.*, 326 U. S. 613, 90 L. Ed. 318, where it was pointed out that the influence of the trial judge on the jury was necessarily of great weight; that the jurors were constantly on the alert as to his every word; that his last remarks, especially in a criminal trial, were apt to be decisive; that if a ruling on a vital issue were misleading, it could not be considered as cured by a prior unexceptional and unilluminating abstract charge; and that a misdirection at this stage of the case could not be classified as a technical error not affecting substantial rights.

The Circuit Court of Appeals, in discussing our contentions under this point (864-865), conceded that in charging the jury the trial Court "did not clearly distinguish" between the two types of prosecution, and also gave the jury an incorrect definition. The Circuit Court of Appeals also admitted that the Government did put its emphasis upon one type rather than the other, but attempted to enlarge the scope of the prosecution to justify a conviction of the second type. We submit that this rationalization did not palliate the evident errors in the instruction. Moreover, no mention whatsoever was made of the cases cited from other jurisdictions.

7.

The trial Court's refusal to charge as requested that the testimony of the complaining witness should be considered by the jury with great caution and subjected to the closest scrutiny was under the circumstances reversible error.

Defendant duly submitted to the Court a number of requests to charge, including the following (740-741):

"15. The testimony of the witness Sorrentino must be considered by the jury with great caution and must be subjected to the closest scrutiny, and unless the jury are convinced beyond a reasonable doubt of the truth of her testimony, the defendant should be acquitted.

"16. If the jury find that the statement made by the witness Sorrentino to Mr. Trost, an agent of the Federal Bureau of Investigation, on December 9, 1941, was substantially correct, the defendant should be acquitted.

"17. In evaluating the testimony of the witness Sorrentino you should take into consideration her earlier record, her previous relationship with the defendant, her apparent desire to harm defendant; the fact that she admittedly made a false charge of intimidation against the defendant; her attempt to extort money from him; and any other facts which might affect the quality of her testimony, as well as inconsistent testimony on earlier trials.

"18. If the jury are in doubt as to where the truth lies as between the testimony of the witness Sorrentino and her contrary statement to Mr. Trost, exonerating the defendant, the defendant is entitled to the benefit of that doubt and he must be acquitted."

None of these requests was granted, the Court merely giving the brief, standard instruction as to the credibility of witnesses in general (745).

At the conclusion of the charge defendant duly excepted to the refusal to give the instructions requested (761).

We do not regard it as necessary to review the entire record as establishing the justification for the requested

instructions. The Circuit Court, as stated above, had already sufficiently characterized the complaining witness, referring to her as "a professional prostitute", "an unruly and extremely unstable person", "wayward from the outset of her career", one who "had early served a term in a reformatory", and as one "who was shown to be to the last degree untrustworthy". Nothing contained in the present record detracts in the most minute degree from the foregoing considered appraisal, and, indeed, if anything, she appeared on this trial as even less deserving of credibility. Under these circumstances it would seem that defendant was absolutely entitled to have the jury charged substantially in the manner requested and that the Court's refusal to comply constituted a grave deprivation of his rights.

Speiller v. *U. S.*, 31 F. 2d 682, presents a close parallel to the instant case. There defendant had been convicted of a like offense on the testimony of an admitted prostitute, who prior to the trial had made one statement as to the purpose of a trip from Pennsylvania to Maryland, and upon the trial repudiated her earlier statement and testified to the contrary. Moreover, she had made a false accusation against the defendant in a state court proceeding—as in the present case the complaining witness had falsely caused defendant to be charged with intimidation. Defendant Speiller requested the trial Court to instruct the jury that the testimony of the witness involved should be scrutinized by the jury with the greatest caution. The request was refused for the reason that it was not made in time. The Circuit Court of Appeals for the Third Circuit reversed the conviction, holding:

> "The defendant requested the judge to charge the following point: 'The Government's sole witness, Mary Hudkinson, admitted having sworn falsely,

and her testimony should be given the greatest scrutiny and considered with the greatest caution.'

Under these circumstances, while the request of the defendant was not submitted in time, the jury should have been instructed, even without request, that her testimony should be subjected to careful scrutiny and considered with great caution."

It has elsewhere been held (*Anderson v. U. S.*, 157 F. 2d 429), that the absence of adequate exception to failure to give instruction to view with distrust the testimony of a witness which should have been so regarded, would not preclude an appellate court from considering such an error. The instruction was of a sort that was regarded as mandatory.

Accordingly, we have herein a case where the conviction rests virtually in its entirety on the testimony of one witness, whose depravity and past conduct were surely such as to necessitate an admonition to the jury regarding the evaluation of her testimony specifically; where due request therefor was made and refused; and where exception was properly noted. In a case so closely contested, wherein the jury could reach a verdict only upon an assurance of leniency, it is impossible to say that such an omission did not induce or influence a verdict against defendant, or that prejudice did not necessarily result.

The Circuit Court of Appeals (865-866A) referred to the Third Circuit decision in *Speiller v. U. S.*, 31 F. 2d 866, and admitted that that case held it to be reversible error to omit such a charge concerning the complaining witness. The attempted differentiation that the witness was corroborated and that the jury had ample warning of her hostile disposition towards defendant, is, we submit, not sufficient to excuse the omission to instruct.

8.

The Court's bare affirmative answer to the jury's written question, transmitted during their deliberations, as to whether they could recommend leniency, was erroneous as tending to induce a verdict of conviction which might not otherwise have been reached.

The point we are about to argue was one that came up so suddenly and unexpectedly, that defendant's counsel, doubtless through failure to appreciate its grave significance, did not object at the time. Nevertheless, we are constrained in this situation to invoke Rule 52 (b) of the Rules of Criminal Procedure, which provides as follows:

> "Plain errors or defects affecting substantial rights may be noted although they were not brought to the attention of the Court."

This rule was recently applied in *Care* v. *U. S.*, 159 F. 2d 464.

After the jury had been deliberating for two hours, the following proceedings occurred (761-762):

> "The Court: For the record. Gentlemen, I have received this communication from the jury:
>
> "'Your Honor, may the jury make a recommendation for leniency?' Signed: K. R. Swift.'
>
> "And I intend to answer that yes."

Seven minutes later the jury returned with a verdict convicting the defendant on all counts (762), together with its recommendation for leniency.

We submit that the foregoing construction given in response to the jury's interrogation, was erroneous and highly prejudicial. To begin with, although this is inci-

dental to the main argument, there should have been no communication between the Court and the jury on any material matter without the jury's returning to open court (*Little* v. *U. S.*, 73 F. 2d 861; *Dodge* v. *U. S.*, 258 F. 300, cert. den. 250 U. S. 660, 63 L. Ed. 1194). The sole materiality for present purposes of the circumstance that the instruction was given in the form of a message is as stated in *People* v. *Hallock*, 267 App. Div. 1030, 48 N. Y. S. 2d 908, where the Court wrote:

> "We know of no authority for such procedure. If the jury desired further instructions it should have been recalled and such instructions given in open court with full opportunity to the defendant to be present, to take exception to the instructions as given and to request further instructions."

That is to say, the correct procedure outlined in the case cited would have facilitated the noting of an exception and a request for further and proper instructions. The substantial phase of the error consisted in the proposition that the Court actually had no right to give a simple affirmative answer to the question propounded. It is true that a Court may in its discretion advise the jury on the subject of a recommendation of lenieney, but it is imperative that such advice simultaneously make it clear that the Court is neither legally nor morally bound by the recommendation. A recent concise statement of the rule is set forth in 23 C. J. S. 1053, and the rationale of the rule is discussed in *Miller* v. *U. S.*, 37 App. D. C. 138; *People* v. *Santini*, 221 App. Div. 439, 222 N. Y. S. 683; *People* v. *Sherwood*, 271 N. Y. 427; *People* v. *Lynch*, 284 N. Y. 239 and *People* v. *Rappolo*, 263 App. Div. 995, 33 N. Y. S. 2d 257.

The application of the principles laid down in the foregoing authorities to the present case shows that the sup-

plementary instruction was plainly of a character calculated to induce a compromise verdict among jurors who otherwise continued to entertain doubts or misgivings as to defendant's guilt. The suggestion from the Court that leniency might serve the ends of justice in such a difficulty undoubtedly pointed a way to relieve them of further responsibility and to curtail more extended deliberations. It is scarcely necessary to argue that grave prejudice necessarily ensued and forestalled an impartial determination of the sole issue of guilt or innocence.

The Circuit Court of Appeals admitted (pp. 866-867) that, so far as the judge's failure to tell the jury that he would not be bound by their recommendation was concerned, the state court cases seemed to be in conflict as to whether this was erroneous. However, the point was rejected for the express reason that it was not plain error and that any irregularity in this connection should have been raised immediately so that it could have been corrected on the spot.

9.

It was error to deny defendant a hearing on controverted issues of fact raised by his motion for a new trial based upon the grounds that the forelady of the jury had fraudulently concealed her prior employment by the Government and that a bailiff in charge of the jury presumed to give the jury instructions during the course of their deliberations.

On October 6, 1947 (768-770), defendant petitioned the Circuit Court of Appeals to remand the cause to the trial judge so that the latter might pass upon his application for a new trial which was predicated upon two grounds relating to the composition and conduct of the jury. The first ground was that Kathryn R. Swift, who was the forelady of the jury, when being impaneled and interrogated as to

hether she was ever employed by the Government, an-
vered in the negative (772-773). She admitted in her
iswering affidavit that she had been employed in the
nited States Government's Office of Censorship in New
ork City from 1941 to 1945, but denied that on the *voir*
re examination she was asked whether she had ever been
nployed by the Government (787-788).

As far as the bailiff aspect of the motion was con-
rned, defendant submitted the affidavit of the bailiff
mself, who stated that he was in charge of the jury
iring its deliberations, when the following occurred
76):

> "During the course of the aforesaid jury's de-
> liberation said jury informed me that they desired
> further instructions of the trial Court with respect
> to their deliberations and with respect to their
> conclusions. I was informed by said jury at the
> time that they desired further instructions of the
> trial Court as to bringing in a divided verdict. I
> did not report this request to the jury to the trial
> Court but instead I thought it proper on my part
> that I could give them instructions as to that request
> and I thereupon informed the jury that they could
> not bring in a divided verdict but that they must
> bring in a unanimous verdict one way or the other.
> This occurred at about 5:00 P. M. of that day. I
> further informed the jury that it was unnecessary
> for me to deliver their request to the trial Court
> and I told them they could return to their deliber-
> ations."

opposition the United States Attorney submitted an-
her affidavit from the same bailiff, sworn to about three
onths later, in which he denied that the foregoing took
ace (783-787).

On October 16, 1947, the Circuit Court of Appeals denied defendant's motion in a memorandum stating that if the trial Court, after hearing and consideration, saw fit to request that the cause be remanded, that request would be granted, but limited this determination to the point of the supposed communication of the bailiff with the jury (795).

In pursuance of this ruling, on a date appointed by the trial judge, which was November 17, 1947, defendant applied at Rutland, Vt., for a judicial inquiry and hearing and an opportunity to submit proof and testimony in support of the application (796).

At the outset of the argument defendant challenged the regularity of the designation of Leamy, *D. J.*, to hear in Vermont an application on a matter pending in the Southern District of New York (800-801).

We cannot within the limits of this brief detail the entire argument, but respectfully refer the Court to the record (800-821), from which the position of the defendant clearly appears. In substance, it was argued on behalf of defendant that issues of fact were raised by the affidavits in support of and in opposition to the application; that these issues could not possibly be resolved by a mere perusal of the papers; and that it was incumbent upon the Court to conduct a hearing at which witnesses could be sworn and their credibility evaluated. To this we may add that the decision of the Circuit Court of Appeals of October 16, 1947, required the District Judge to make a determination whether to request a remand "after hearing." It is self-evident that the argument of counsel before the learned judge did not constitute any hearing at all, and we urge that the determination made by him on November 28, 1947, that no request for remand should be made (822-823) was violative of the Circuit Court's ruling and independently erroneous. In fact, the letter written

by the Court to the prosecutor two months before the "hearing" (792) demonstrates that it had prejudged the application.

On December 5, 1947, defendant served and filed a supplemental notice of appeal (853), bringing up for review the order of the District Court directing that no request for remand be made.

While we appreciate that on the motion to remand, the Circuit Court of Appeals, by limiting the *nisi prius* consideration to the transactions between the bailiff and the jury, in effect ruled that it regarded the untruthful answer by the juror as legally inconsequential, we again adverted to the point in the Circuit Court of Appeals both so that that Court might reconsider its previous views and also to preclude any claim that we have abandoned it. We submit that upon a showing that the proposed juror had recently been employed as a confidential agent of the Government, working in the Censorship Office on criminal matters in collaboration with agents of the Federal Bureau of Investigation, the denial that she had ever been employed by the Government became most important. If defendant was not technically entitled to challenge her for cause on that ground, sound judgment would have dictated the use of a peremptory challenge in the circumstances. The leading case on the subject is *Clark* v. *U. S.*, 289 U. S. 1, 77 L. Ed. 993, where Mr. Justice Cardozo wrote:

> "'A talesman when accepted as a juror becomes a part or member of the court. *In re Savin*, 131 U. S. 267, 9 S. Ct. 699, 33 L. Ed. 150; *United States* v. *Dachis* (D. C.), 36 F. 2d 601. The judge who examines on the *voir dire* is engaged in the process or organizing the court. If the answers to the questions are willfully evasive or knowingly untrue, the

talesman, when accepted, is a juror in name only. His relation to the court and to the parties is tainted in its origin; it is a mere pretense and sham. What was sought to be attained was the choice of an impartial arbiter. What happened was the intrusion of a partisan defender. If a kinsman of one of the litigants had gone into the jury room disguised as the complaisant juror, the effect would have been no different. The doom of mere sterility was on the trial from the beginning."

See also *Anthony* v. *Schofield*, 266 App. Div. 905, 42 N. Y. S. 2d 784; *McHugh* v. *Jones*, 258 App. Div. 111, 16 N. Y. S. 2d 332, affd. 283 N. Y. 534; *People* v. *Leonti*, 262 N. Y. 256; *Baker* v. *Hudspeth*, 129 F. 2d 779; *Carpenter* v. *United States*, 100 F. 2d 716 and *Chambers* v. *United States*, 237 F. 513. No Court should place the stamp of approval upon a trial wherein one of the jurors gives untruthful information upon a *voir dire* examination and thereby forecloses a person charged with crime from exercising the prerogative of peremptory challenge.

So far as the second phase of the application is concerned, we believe that the Circuit Court of Appeals considered the proposition as being presumptively meritorious and that when it ordered a hearing it intended that the Court below should take testimony and ascertain by a full dress inquiry whether the bailiff had transgressed in the fashion charged. What the trial Court did was merely to permit counsel to argue the matter, and this of course did not meet the most elementary requirements of a hearing.

The bailiff's original affidavit, presented by defendant, shows that he was informed by the jury that they desired further instructions; that he did not report their request to the Court but actually presumed to instruct them that they could not bring in a divided verdict but had to return

a unanimous verdict one way or another; he further told them that it was unnecessary for him to deliver their request to the judge but that they could resume their deliberations.

If this was what happened, and the recanting affidavit of the bailiff does nothing more than becloud the question with uncertainty, we are bound to characterize his conduct as a most flagrant invasion of the rights of a defendant on trial for his liberty. We do not think it necessary to detail the numerous cases condemning unauthorized communications with the jury by any person connected with the Court, and even by the Court itself in the absence of a defendant and his counsel. Several illustrative situations are *Chang* v. *United States*, 91 F. 2d, 805; *Little* v. *United States*, 73 F. 2d, 861; *Wheaton* v. *United States*, 133 F. 2d, 522; and *United States* v. *Sorcey*, 151 F. 2d 899. The Supreme Court of the United States held, in *Mattox* v. *U. S.*, 146 U. S. 140, 150, 36 L. Ed. 917, that it would not tolerate any grounds of suspicion that the administration of justice had been interfered with, and would not even require a showing that a tampering had really taken place, saying further (by Mr. Chief Justice Fuller):

> "Private communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officer in charge, are absolutely forbidden, and invalidate the verdict, at least unless their harmlessness is made to appear.
>
> "Indeed, it was held in *People* v. *Knapp*, 42 Mich. 267, that the presence of an officer during the deliberations of the jury is such an irregular invasion of the right of trial by jury as to absolutely vitiate the verdict in all cases without regard to whether any improper influences were actually exerted over the jury or not. And in *State* v. *Snyder*, 20 Kan.

306, where the bailiff, who had charge of the jury, had been introduced and examined as a witness on behalf of the State and had testified to material facts against the accused, his presence in the jury room during the deliberations of the jury was held fatal to the verdict."

Under the foregoing authority (see also Housel and Walser, "Defending and Prosecuting Federal Criminal Cases," Sec. 696), defendant was entitled that the issues raised should be made the subject of a full inquiry at which witnesses could testify and be cross-examined under oath. This right was denied, and we submit the ruling was error.

The rule making a hearing mandatory is clearly explained in the *Sorcey* case, 151 F. 2d 899. There the Circuit Court of Appeals for the Seventh Circuit, after discussing the familiar rule that a jury should pass on a case free from external influences tending to disturb the exercise of deliberate and unbiased judgment, and the corollary that communications between jurors and officers in charge of the jury were absolutely forbidden, said:

> "And where, upon a motion for a new trial, it is claimed that communications have taken place and competent evidence is offered to substantiate the claim it is the duty of the Court to hear and consider it."

That duty is not discharged by a summary refusal to permit any witnesses to be called or examined on the subject.

Notwithstanding the holding of the Seventh Circuit in *U. S.* v. *Sorcey*, 151 F. 2d 899, the Circuit Court of Appeals herein ignored that authority and summarily con-

cluded that the showing made by defendant was not sufficient to justify a further investigation, a conclusion we believe to be palpably erroneous.

CONCLUSION.

For the reasons stated in the petition and in this brief, it is respectfully submitted that the application for a writ of certiorari should be granted.

Dated: New York, New York, July 7, 1948.

Respectfully submitted,

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